IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

KIM ARNOLD, a married woman, Appellant, vs. KATE REZVANI and JOHN DOE REZVANI, her husband, and FARSHID REZVANI and JANE DOE REZVANI, his wife, Respondents.	)	DIVISION ONE No. 54885-9-I **UNPUBLISHED OPINION** FILED: August 28, 2006

BAKER, J. — Kim Arnold appeals from a judgment awarding her damages for injuries she sustained in a vehicle accident. The jury awarded less than she sought. We conclude that the court did not err by admitting Arnold's prior medical records because, when considered in connection with other evidence, they were relevant to establishing a preexisting medical condition. And, because there was sufficient evidence to create an issue of whether Arnold's medical condition was dormant or symptomatic at the time of the accident, the court did not err by giving a jury instruction concerning aggravation of a preexisting condition. We affirm.

I.

On May 17, 2000, Kate Rezvani was in a vehicle accident with Kim Arnold. Rezvani was at fault. Arnold received medical treatment following the accident, at a total cost of $18,356.05.

Arnold sued Rezvani for damages stemming from her injuries. Rezvani admitted liability, but disputed damages. Arnold claimed that she suffered right cervical radiculopathy as a result of the accident. During trial, Arnold's doctor, Carolyn Marquardt, testified that the accident caused this medical condition, and that she prescribed a prednisone taper as treatment.

On cross-examination, Rezvani questioned Dr. Marquardt about the fact that Arnold was diagnosed with right cervical radiculopathy by another doctor and prescribed the same treatment one year before the accident. Dr. Marquardt said that, at the time she diagnosed Arnold, she was not aware that Arnold had been diagnosed with the same condition in 1999. Subsequently, Arnold testified that she did not follow the treatment that the doctor prescribed in 1999 to treat her right cervical radiculopathy.

At the end of trial, Rezvani moved to admit two medical records—exhibits 32 and 43—as proof of a preexisting medical condition. Exhibit 32 is a record from Virginia Mason Medical Center, showing that on April 26 and May 19, 1999, Arnold consulted a doctor for right posterior shoulder and neck pain. On May 19, the doctor diagnosed Arnold with right cervical radiculopathy and prescribed a prednisone taper and referral back to a physical therapist for treatment. Exhibit 43 is a May 11, 1999 record from the physical therapy department at Virginia Mason, indicating that Arnold was treated for

shoulder and neck pain on the right side. Arnold objected to the admission of this evidence on the basis that it was not relevant because there was no showing that Arnold was suffering from the medical condition immediately before the accident. The court disagreed and admitted the evidence.

Over Arnold's objection, the court also gave a jury instruction based on Washington Pattern Jury Instruction (WPI) 30.17,[1] pertaining to the aggravation of a preexisting condition.

The jury returned a verdict in favor of Arnold and awarded $9,725.05 for the cost of her medical treatment and $10,000 for noneconomic damages. The court entered judgment consistent with the verdict. Arnold moved to vacate the judgment and for a new trial, arguing that the court erred by admitting the prior medical records and by giving a jury instruction regarding aggravation of a preexisting condition. The court denied her motion. She now appeals.

II.

Arnold argues that the court erred by admitting her previous medical records as evidence. We review a trial court's decision to admit evidence for an abuse of discretion.[2] Because the admissibility of evidence rests within the sound discretion of the trial court, we will not disturb its decision unless no reasonable person would adopt the same view.[3]

Arnold maintains that Rezvani used the medical records showing a previous

[1] 6 Washington Pattern Jury Instructions: Civil 30.17 (5th ed. 2005).
[2] State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).
[3] Atsbeha, 142 Wn.2d at 913-14.

medical condition as impeaching evidence and claims that the evidence was not admissible as proof of the matters contained therein. But, Arnold objected to the admission of the records based on relevance.[4] She did not argue that they were only used as impeaching evidence.

Rezvani used the medical records to contradict substantive testimony concerning causation. On cross-examination of Dr. Marquardt, Rezvani's attorney questioned the doctor about Arnold's medical records from 1999 in order to discredit Dr. Marquardt's diagnosis that the accident caused Anderson's cervical radiculopathy. Dr. Marquardt testified that, at the time she diagnosed Arnold, she was unaware of Arnold's previous history of cervical radiculopathy. The medical records showed that Arnold was diagnosed with the same condition one year before the accident.

Further, Rezvani used the records to show that Arnold's medical condition was preexisting. Citing Harris v. Drake,[5] Arnold argues that they were not relevant to that issue because the evidence did not show that Arnold's medical condition was symptomatic immediately before the accident.

In Harris, the plaintiff suffered back and shoulder injuries from an automobile accident.[6] Harris sued the at fault driver, Drake.[7] At trial, Drake admitted liability but disputed damages.[8] The court did not permit Drake to enter evidence that, about 14

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[4] She also objected to Exhibit 43, the physical therapy record, because it was not offered under ER 904. But Arnold does not advance this argument on appeal.

[5] 116 Wn. App. 261, 65 P.3d 350 (2003), aff'd, 152 Wn.2d 480, 99 P.3d 872 (2004).

[6] Harris, 116 Wn. App. at 266.

[7] Harris, 116 Wn. App. 266.

[8] Harris, 116 Wn. App. 268.

months before the accident, Harris complained of pain.[9] At the end of trial, it granted a directed verdict on the issue of causation.[10]

On appeal, Drake argued that the trial court erred by not allowing her to prove that Harris complained of pain to a chiropractor 14 months before the accident.[11] But our court rejected her argument, explaining that Drake did not call the chiropractor to testify, but rather attempted to rely on Harris's admission that he suffered mid and low back pain and on another doctor's testimony that there was a note in the chiropractor's chart that stated "left shoulder pain, MRI 2/24/95."[12] The doctor also testified that he had no idea what that note meant. There was no evidence that Harris was experiencing shoulder pain just prior to the accident.[13] For purposes of proximate causation, the preexisting condition must be symptomatic at the time of the accident.[14] Under these circumstances, Drake's "offer of proof had no tendency to prove a fact of consequence to the action."[15]

Drake also argued that the court erred by directing the verdict on the issue of causation because he submitted evidence of a preexisting medical condition which made causation on some of the injuries debatable.[16] Specifically, Drake submitted evidence that: one month after the accident, Harris's shoulder was normal; Harris's shoulder problem reappeared after he resumed his job as a painter; and painters often

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[9] Harris, 116 Wn. App. at 268.
[10] Harris, 116 Wn. App. at 268.
[11] Harris, 116 Wn. App. at 288.
[12] Harris, 116 Wn. App at 288.
[13] Harris, 116 Wn.App at 288.
[14] Harris, 116 Wn. App at 288-89.
[15] Harris, 116 Wn. App at 289.
[16] Harris, 152 Wn.2d at 493; Harris, 116 Wn. App. at 289.

have similar medical conditions as a result of their profession.[17]

Our court rejected Drake's argument because, even assuming the evidence inferred a preexisting condition, Drake presented no evidence that such condition was symptomatic at the time of the accident.[18]

On review, our Supreme Court affirmed, noting:

> Even allowing for the possibility of a preexisting condition, the defense failed to show that such condition was symptomatic prior to the accident. When an accident lights up and makes active a preexisting condition that was dormant and asymptomatic immediately prior to the accident, the preexisting condition is not a proximate cause of the resulting damages.[19]

The circumstances we are presented with are distinguishable. The medical records, as well as the testimony of Dr. Marquardt and Arnold, proved that Arnold was diagnosed with the same condition—right cervical radiculopathy—and was prescribed the same treatment—a prednisone taper—one year before the accident.

Additionally, Rezvani presented evidence that could persuade a reasonable person to conclude that the preexisting condition was symptomatic at the time of the accident. Arnold testified on cross-examination that she did not follow the treatment that she was prescribed in May 1999 for cervical radiculopathy. It is reasonable to infer that the untreated medical condition existed and remained symptomatic at the time of the accident.

The trial court noted that, if the medical records said that there was a preexisting condition that was treated and there was no further evidence, it would not admit the

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[17] Harris, 152 Wn.2d at 493-94.
[18] Harris, 116 Wn. App at 289-90.
[19] Harris, 152 Wn.2d at 494.

records or give a jury instruction on the issue. But, because there was evidence that Arnold did not follow the course of treatment, this was an issue for the jury.

Considering that "the threshold for relevance is extremely low under ER 401,"[20] the trial court's decision was reasonable. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[21] When considered in connection with the evidence that Arnold did not follow through with the treatment plan, the evidence that she was diagnosed with the same condition one year before the accident makes it more probable that the condition was symptomatic immediately prior to the accident, and is therefore relevant. The court did not abuse its discretion by admitting the medical records.

Arnold next argues that the court erred by giving a jury instruction on aggravation of a preexisting medical condition because the evidence did not support the instruction. Whether there is sufficient evidence to support a jury instruction is a matter within the discretion of the trial judge.[22]

Jury instructions are appropriate if, when read as a whole, they permit each party to argue her theory of the case, are not misleading, and properly inform the trier of fact of the applicable law.[23] "In general, a party is entitled to an instruction on her

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[20] City of Kennewick v. Day, 142 Wn.2d 1, 8, 11 P.3d 304 (2000).

[21] ER 401.

[22] Seattle Western Indus., Inc. v. David A. Mowat Co., 110 Wn.2d 1, 10, 750 P.2d 245 (1988). However, alleged errors of law in a trial court's jury instructions are reviewed de novo. Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 266, 96 P.3d 386 (2004).

[23] Brown v. Spokane County Fire Protec. Dist. 1, 100 Wn.2d 188, 194, 668 P.2d 571 (1983).

theory of the case if she has presented sufficient evidence to the jury to create a jury issue on the facts underlying the theory."[24]

The court gave WPI 30.17, which is an instruction on aggravation of a preexisting condition. It instructs:

> If you find that:
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> (1) before this occurrence the plaintiff had a pre-existing condition that was causing pain or disability, and
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> (2) because of this occurrence the condition or the pain or the disability was aggravated, then you should consider the degree to which the condition or the pain or disability was aggravated by this occurrence.
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> However, you should not consider any condition or disability which may have existed prior to the occurrence or from which the plaintiff may now be suffering, that was not caused or contributed to by this occurrence.

As mentioned, Rezvani presented evidence that Arnold was diagnosed with right cervical radiculopathy one year before the accident and did not follow the prescribed treatment. This is sufficient evidence to create an issue of whether Arnold's medical condition was dormant or symptomatic at the time of the accident, justifying the instruction. The pattern jury instruction was not misleading and properly informed the jury on the law.

The court also gave WPI 30.18, the instruction on a previous infirm condition:

> If you find that:
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> (1) before this occurrence the plaintiff had a bodily condition that was not causing pain or disability; and
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> (2) because of this occurrence the pre-existing condition was lighted up and made active,

[24] Thogerson v. Heiner, 66 Wn. App. 466, 474, 832 P.2d 508 (1992).

> then you should consider the lightning up and any other injuries that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those which would have been incurred under the same circumstances by a person without that condition.

When read together, the two instructions accurately explained the law and permitted the jury to consider both parties' theories of causation. Where there is a valid dispute concerning whether a preexisting condition exists, it is appropriate for a trial court to give both WPI 30.17 and 30.18.[25]

AFFIRMED.

Baker, J.

WE CONCUR:

Cox, J.

Coleman, J.

[25] Thogerson, 66 Wn. App. at 474; Bowman v. Whitelock, 43 Wn. App. 353, 359, 717 P.2d 303 (1986).